Supreme Court, U.S.
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No. 98-1409

In The

Supreme Court of the United States

October Term, 1998

OLIN T.C. DAWSON,

Petitioner,

v.

LOUISIANA STATE UNIVERSITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table Of Contents i

Table Of Authorities iii

Cases iii

Statutes iii

Rules iv

Statement Of The Case 1

Facts 1

Procedural History 4

Summary Of Argument 5

A. Summary Judgment Was Properly Granted Regarding Petitioner's Termination Claim 5

B. Petitioner Failed To Preserve His Discovery Objection 5

C. Petitioner Failed To Properly Assert A Due Process Claim 6

Argument 6

The Termination Claim 6

A. Petitioner Cannot Establish A Prima Facie Case 7

B. Respondent Had Non-Discriminatory Reasons For Terminating Petitioner 7

C. Petitioner Cannot Bear His Ultimate Burden Of Proof 9

The Appropriate Scope Of Discovery 10

Petitioner's Due Process Argument 11

TABLE OF CONTENTS – Continued

Page

A. Petitioner Never Properly Raised The Issue In The Trial Court 11

B. Petitioner Did Not Have A Constitutionally Protected Property Right In His Continued Employment 12

C. Petitioner Was Accorded Due Process 13

Other Claims 14

A. The Associate Director Claim 15

B. The Assistant Director Claim 16

C. The Claim Of Retaliation 16

Conclusion 17

TABLE OF AUTHORITIES

Page

CASES

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 12

Cabrol v. Town of Youngsville, 106 F.3d 101 (5th Cir. 1997) 13

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) ...12, 14

Davis v. Chevron, U.S.A., 14 F.3d 1082 (5th Cir. 1994) 9

Jackson v. Widnall, 99 F.3d 710 (5th Cir. 1996) 11, 12

Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978) 11

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 9

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) 7, 9

Singletary v. B.R.X., Inc., 828 F.2d 1135 (5th Cir. 1987) 10

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 8, 9

STATUTES

Fourteenth Amendment to the United States Constitution 11, 12, 14

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2000e *et seq.* 4

Louisiana Civil Code article 2747 13

RULES

Federal Rules of Civil Procedure

Rule 72(a) 6, 10

Local Rules for the Middle District of Louisiana
Rule 74.1 .....6, 10

Rule 14(1)(a) of the Rules of the Supreme Court of the United States 15

STATEMENT OF THE CASE

A. Facts

Respondent, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU") hired the petitioner, Olin "Cecil" Dawson ("Petitioner"), a black male, on October 1, 1980 (Dawson depo. at 21).[1] From 1981 to 1994, Petitioner served as an Area Coordinator in LSU's Department of Residential Life (Dawson depo. at 22).

As early as 1990, Petitioner's supervisors began noting that he was experiencing personal problems that affected his job performance. His 1990 evaluation stated that "personal frustrations have created apprehensions within the staff." The evaluation also noted:

> Some personal frustrations have festered into outspoken comments approaching a loss of temper. This is proving disruptive to staff relationships and produces a negative tone in staff meetings.

(Dawson depo. at 304-06, Dawson depo. exhibit 23).

In 1993, Doris Collins, Director of Residential Life, initiated an external review of the department. The review was conducted by two independent consultants.

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[1] Petitioner's uncondensed deposition was attached to and offered into evidence with Respondent's motion for summary judgment. It is contained in three bound volumes separate from the rest of the record on appeal, and has not been consecutively numbered as has the rest of the appellate record. Accordingly, when referring to the deposition, LSU will cite directly to the transcript page number, rather than to a record page number.

Collins' goal was to increase the department's efficiency while reducing its administrative costs. In early 1994, Collins began reorganizing the department based on the consultants' recommendations (rec. at 212-13).

As part of the reorganization, a new position, Associate Director, was created. The person holding this position would be the "second-in-command" in the department. Seven applicants, including Dawson, were interviewed. Debora Baker, a white female, was hired to fill the new position in March, 1994. Baker had previously been responsible for the day-to-day operation of the housing department at the University of Oklahoma. Baker became Petitioner's immediate supervisor (rec. at 214, 241-42).

As part of the same reorganization, the four Area Coordinator positions, including Petitioner's, were eliminated and replaced by two new Assistant Director positions. Dawson was hired to fill one of the new positions. These new positions involved more duties and responsibilities than did the old Area Coordinator positions, and Dawson therefore received a substantial pay increase (rec. at 215; Dawson depo. at 90-98).

Throughout the summer of 1994, Petitioner was involved in a series of disciplinary and administrative incidents of escalating seriousness and frequency. He missed meetings and fell asleep or appeared drowsy in others; failed to perform assigned tasks; and lost his temper and became openly hostile towards Baker on several occasions. Most disturbingly, in a conversation with the Assistant to the Chancellor, Petitioner admits that he angrily referred to Residential Life as a "rathole" and

said "something needs to be done before somebody blows the whole messed-up area off the map" (rec. at 216, 233-37, 240, 242-44, 249-58; Dawson depo. at 235-42).[2]

Forest Benedict, Associate Chancellor for Human Resource Management, learned of Dawson's poor job performance and threatening and irrational behavior from representatives of Residential Life. Benedict investigated these reports and concluded that Petitioner might pose a threat to himself and/or others. Accordingly, by letter dated September 15, 1994, Benedict notified Dawson that he was being placed on administrative leave and was not to return to campus. The letter stated that Respondent was considering whether to terminate Dawson's employment and invited him to provide reasons why such action should not be taken (rec. at 259-63).

By letter dated December 7, 1994, Benedict notified Petitioner that although Respondent felt that Dawson's conduct justified his termination, the University would be willing to consider returning him to employment in a different department. The letter also invited Petitioner to schedule a meeting to discuss alternatives and advised him that he could have legal counsel present at that meeting if he chose (rec. at 260, 267).

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[2] Respondent contends that in that same meeting, and again the next day in a meeting with the Chancellor, Dawson threatened to kill Debora Baker. LSU further contends Dawson emphasized that he was a Vietnam veteran and had been trained to kill. Dawson denies these other contentions, and for purposes of summary judgment only, Respondent accepts his version of events as true.

Petitioner never scheduled a meeting; did not make any effort to meet with Benedict to discuss alternative employment opportunities with Respondent; and never gave any reasons why LSU should not terminate his employment. Accordingly, by letter dated March 8, 1995, Benedict notified Petitioner that he was terminated (rec. at 260.5).

2. Procedural History

Petitioner filed this lawsuit in June, 1995, in the United States District Court for the Middle District of Louisiana. Petitioner alleges that LSU unlawfully discriminated against him on the basis of his race, in violation of 42 U.S.C. § 2000e (rec. at 562).

On March 7, 1997, Petitioner filed a motion to compel seeking statistical data from the entire University (rec. at 410-16). Respondent had previously provided that information as to the Department of Residential Life, but objected to any further production.

On January 12, 1998, Respondent filed a motion for summary judgment as to all claims.

On January 9, 1998, United States Magistrate Judge Docia Dalby ruled on Petitioner's motion to compel. The magistrate judge agreed with LSU and limited discovery to the Department of Residential Life (rec. at 271-74). Petitioner did not appeal that ruling to the district court.

On February 13, 1998, Magistrate Judge Dalby recommended that the district court grant Respondent's motion for summary judgment (rec. at 45-52). On June 8, 1998, the district court granted LSU's motion for summary

judgment for the reasons set forth in the magistrate judge's report (rec. at 4). Final judgment was signed that same date (rec. at 3).

The United States Court of Appeals for the Fifth Circuit affirmed the decision per curiam on December 4, 1998.

SUMMARY OF ARGUMENT

A. Summary Judgment Was Properly Granted Regarding Petitioner's Termination Claim

The district court and court of appeals properly concluded that there were no genuine issues of material fact regarding Petitioner's termination. Dawson cannot establish a prima facie case of discrimination in connection with his termination claim because, *as he admits in his petition,* a black male was hired as his permanent replacement. Furthermore, Dawson's only evidence that the decision to terminate him was a pretext for unlawful discrimination is his own uncorroborated, self-serving, conclusory testimony. This is insufficient as a matter of law to carry his ultimate burden of proof. Furthermore, Petitioner cannot refute Respondent's legitimate, nondiscriminatory reasons for its decision.

B. Petitioner Failed To Preserve His Discovery Objection

Petitioner challenges the scope of discovery established by the magistrate judge. However, he failed to appeal the magistrate judge's ruling to the district court

as provided for by Rule 72(a) of the Federal Rules of Civil Procedure and Rule 74.1 of the Local Rules for the Middle District of Louisiana. Therefore, as the Fifth Circuit expressly held, Petitioner cannot raise this issue on appeal or in his petition to this Court.

C. Petitioner Failed To Properly Assert A Due Process Claim

Dawson failed to raise his due process argument properly in the district court, as expressly noted by the magistrate judge. Alternatively, even if the claim was properly asserted, Petitioner did not have a constitutionally protected property interest in continued employment. Finally, even though not required to do so, LSU accorded Dawson full due process in connection with his termination.

ARGUMENT

THE TERMINATION CLAIM

Petitioner claims the district court and court of appeals erred when they granted Respondent's motion for summary judgment and dismissed the case. Respondent submits that Petitioner's claim is without merit and that his own petition illustrates that he cannot establish a prima facie case of discrimination or bear his ultimate burden of proof. Therefore, Petitioner is not entitled to review by this Court.

A. Petitioner Cannot Establish A Prima Facie Case Of Race-Based Discrimination

As has been well established by this Court, to maintain a prima facie case of discrimination in a termination case, a plaintiff must show: (1) that he is a member of a protected class, (2) that he was qualified for the position he held, (3) that he was discharged, and (4) that after his discharge, the position he formerly held was filled by someone outside the protected class. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

Petitioner cannot establish a prima facie case of discrimination because, as he admits in his own petition, a black male was hired as his permanent replacement (pet. at 9). Furthermore, it is clear that Petitioner's poor job performance and irrational behavior made him unqualified for his position. As a matter of law, Petitioner cannot establish a prima facie case of discrimination.

B. Respondent Had Non-Discriminatory Reasons For Terminating Petitioner

As early as 1990, but particularly during 1994, Petitioner was involved in a series of disciplinary and administrative incidents of escalating seriousness and frequency. These incidents included both behavioral and administrative problems with Dawson's job performance: (1) multiple complaints of Petitioner becoming angry with and directing profanity towards his co-workers, student workers, and dormitory house council members, (2) several instances in which Petitioner was openly insubordinate, angry, and profane with his immediate supervisor,

Debora Baker, (3) numerous complaints of Petitioner missing meetings and training sessions, (4) reports of Petitioner appearing drowsy during meetings and sleeping through others, and (5) occasions when Petitioner failed to carry out specific tasks for which he was responsible. These incidents culminated with Petitioner admittedly telling the Assistant to the Chancellor that Residential Life was a "rathole" and that "something needs to be done before somebody blows the whole messed-up area off the map".[3]

Petitioner disputes whether some of these events ever occurred. But Respondent discharges its burden of articulating non-discriminatory reasons for its action simply by producing evidence that these incidents were reported to the decision-makers. It is immaterial whether Dawson believes a factual issue exists as to Respondent's numerous proffered reasons. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). He still must show that the decisions were motivated by race or retaliation. This, he cannot do.

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[3] LSU contends that Dawson actually threatened to kill Debora Baker. *See supra* note 1. For purposes of summary judgment only, LSU accepts Dawson's more limited version of events as true. It is uncontroverted, however, that this was the *reported* content of Dawson's statements, and that these reports were known to those who made the decision to terminate Dawson's employment.

C. Petitioner Cannot Bear His Ultimate Burden Of Proof

Once an employer has articulated a non-discriminatory reason for its conduct, which LSU has done, the burden shifts to the appellant to show that the proffered reasons are pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). This requires a showing "both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Center*, 509 U.S. at 515, 113 S. Ct. at 2752. Whatever evidence the claimant tenders must rebut each of the employer's proffered rationales. *Burdine*, 450 U.S. at 256.

Petitioner has offered no evidence to rebut LSU's non-discriminatory reasons for his discharge. In fact, he **admits** that he resented Ms. Baker, his supervisor; that he had trouble getting along with co-workers and students; that he missed meetings; and that he made the threatening statements to the Assistant to the Chancellor.

Furthermore, even though Petitioner disputes certain events, he offers no evidence in support of his contentions, but only his own self-serving conjecture. Respondent has proffered legitimate non-discriminatory reasons for discharging Petitioner and has supported them with uncontroverted documentary evidence. Petitioner's only response is to continue to insist he was discriminated against. *He cannot point to a single specific fact in support of his ultimate burden of proof.* This is simply insufficient to withstand summary judgment. *See Davis v. Chevron, U.S.A.*, 14 F.3d 1082, 1088 (5th Cir. 1994).

Dawson's petition for writ of certiorari on this claim should be denied.

THE APPROPRIATE SCOPE OF DISCOVERY

Petitioner propounded written discovery requests seeking statistical data regarding the entire LSU system. Respondent provided Dawson with the requested information with regard to the Department of Residential Life, but objected to the requests to the extent they sought information outside that department. Seventeen months later, Petitioner filed a motion to compel the production of university-wide information. Magistrate Judge Dalby ruled that Dawson was entitled only to statistical information regarding his department.

Petitioner contends on appeal that the magistrate judge improperly limited the scope of discovery. However, he never appealed the ruling to the district court as provided for by Rule 72(a) of the Federal Rules of Civil Procedure and Rule 74.1 of the Local Rules for the Middle District of Louisiana. Instead, he raised the issue for the first time on appeal to the Fifth Circuit Court of Appeals.

As expressly noted by the Fifth Circuit, because Petitioner did not appeal the ruling to the district court, he cannot raise the issue on appeal or in this petition (Opinion at 2) (per curiam). *See also Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1137 (5th Cir. 1987) ("[P]retrial matters referred by a trial judge to a magistrate must be appealed first to the district court.").

Furthermore, it is clear that the factual basis for Petitioner's claims is confined to the Department of Residential Life and the actions of Doris Collins, the Director of the department, and Debora Baker, the Associate Director of the department. Accordingly, the decision to

limit discovery was proper. *See Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 592 (5th Cir. 1978):

> [I]n the context of investigating an individual complaint the most natural focus is upon the source of the complained of discrimination – the employing unit or work unit. To move beyond that focus the plaintiff . . . must show a more particularized need and relevance.

Dawson's petition for writ of certiorari on this issue should be denied.

PETITIONER'S DUE PROCESS ARGUMENT

Petitioner argues that the trial court erred in granting summary judgment because there exist genuine issues of material fact regarding whether he was accorded due process under the Fourteenth Amendment to the United States Constitution.

Respondent's reply is three-fold. First, Petitioner improperly raised this issue for the first time on appeal. Second, as an at-will employee under Louisiana law, Dawson did not have a constitutionally protected property right in his continued employment. Third, Petitioner was accorded due process, even though he was not entitled to it.

A. Petitioner Never Properly Raised The Issue In The Trial Court

Allegations of constitutional violations must be pled with factual detail and particularity. *Jackson v. Widnall*, 99 F.3d 710, 714 (5th Cir. 1996). Constitutional claims not

raised in the district court are deemed waived and may not be asserted for the first time on appeal. *Id.* at n.9.

Dawson did not plead a due process violation in the district court *at all*, much less with factual detail and particularity. Nor did he raise the issue in his one-page opposition to Respondent's motion for summary judgment. Consequently, the district court found in its reasons for summary judgment that Petitioner had only asserted claims for unlawful discrimination (rec. at 46).

Because Petitioner failed to properly raise the due process issue in the district court, he cannot raise it now before this Court.

B. Petitioner Did Not Have A Constitutionally Protected Property Right In His Continued Employment

Even if his due process argument is properly before the Court, Petitioner does not have a constitutionally protected property right in his continued employment.

The Fourteenth Amendment's Due Process Clause does not create a property interest in government employment. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Instead, constitutionally protected property interests derive from independent sources, such as contract or state law. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Absent a property interest, there is no interest subject to due process protection and the inquiry ends.

Without a contractual agreement for employment for a specified term or a legislative or regulatory restraint on a public entity's termination authority, Louisiana law does not establish a right to continued employment. *See* La. Civ. Code art. 2747. *See also Cabrol v. Town of Youngsville*, 106 F.3d 101 (5th Cir. 1997).

Petitioner was not a civil service employee and was, in fact, an unclassified, "at-will" employee. He did not have a contract for a specified term of employment, and he has not pointed to any legislative or regulatory restraint on Respondent's ability to terminate him. Under Louisiana law, he had no constitutionally protected property right in continued employment with LSU. Accordingly, the Due Process Clause affords Dawson no protection.

C. Petitioner Was Accorded Due Process

Notwithstanding that Petitioner had no property interest in his job, Respondent accorded him due process prior to his termination.

In his letter of September 15, 1994, Forest Benedict, Associate Chancellor for Human Resource Management, notified Petitioner that he was being placed on administrative leave and was not to return to campus. Benedict also told Dawson that the University was considering terminating his employment, and requested that Petitioner provide reasons why the University should not do so. Dawson did not respond to Benedict's letter.

In a subsequent letter, Benedict informed Petitioner that although Respondent felt his job performance and

conduct justified his termination, the University would consider returning Dawson to employment in a different department. The letter also asked Petitioner to schedule a meeting to discuss such an alternative. Benedict also advised Dawson that he could have legal counsel present at that meeting if he chose. Petitioner never scheduled a meeting nor made any effort to meet with Benedict to discuss alternative employment opportunities or any justification for his behavior.

Respondent subsequently terminated Dawson's employment.

The Fourteenth Amendment does not require a formal hearing, but only that the claimant be given reasonable notice and an opportunity to be heard. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1979). Respondent provided such notice and opportunity to Dawson, and he is therefore not entitled to review on this claim.

OTHER CLAIMS

In the "Reasons For Granting The Writ" section of his petition, Petitioner refers to other distinct claims. He claims Respondent discriminated against him by not promoting him to the new Associate Director position (pet. at 15). He also claims the old Area Coordinator and new Assistant Director positions were one and the same, and that he was unlawfully required because of his race to reapply for a position he already held (pet. at 16). Finally, he claims Respondent unlawfully retaliated against him for writing a letter to the Attorney General of the United States (pet. at 13-15).

Petitioner did not list these additional claims in the "Questions Presented" section of his petition, and thus, under Rule 14(1)(a) of the Rules of the Supreme Court of the United States, they are not before the Court. Respondent objects to Petitioner's inclusion of these additional claims, but will nevertheless briefly address them.

A. The Associate Director Claim

Petitioner claims LSU discriminated against him by hiring Debora Baker for the new Associate Director position, rather than promoting him. The magistrate judge's report, which was adopted by the district court, expressly rejected this claim:

> In order to establish a prima facie case of race discrimination on a non-promotion claim, [Petitioner] must prove, as one of the essential elements of his claim, that he was qualified for the position in question. . . . [Petitioner] has not done so here.

(rec. at 45-52).

The Fifth Circuit affirmed:

> [W]e conclude that summary judgment was appropriate, essentially for the reasons stated in the magistrate judge's report and recommendation, which was adopted by the district court.

(Opinion at 2) (per curiam).

B. The Assistant Director Claim

Petitioner claims that the old Area Coordinator and new Assistant Director positions were one and the same, and that Respondent unlawfully harassed and discriminated against him by requiring him to reapply for a position he already held. LSU demonstrated, however, that the second Assistant Director position was filled with a white male who, like Petitioner, had previously been an Area Coordinator. In other words, Petitioner received precisely the same treatment as a white person. The magistrate judge's report, which was adopted by the district court, expressly rejected this claim:

> Dawson admits in his deposition that [a white male] also was required to apply for the position. . . . [Petitioner] still must come forward with specific facts showing that similarly situated persons outside the class (i.e., whites) were treated more favorably. [Petitioner] has come forward with no such proof here.

(rec. at 45-52).

As previously noted, the Fifth Circuit affirmed the decision.

A. The Claim Of Retaliation

Petitioner claims that Respondent retaliated against him after he wrote a letter directly to the Attorney General of the United States. The magistrate judge's report, which was adopted by the district court, stated that Dawson did not properly raise any claims other than those for unlawful discrimination:

> The legal memoranda discuss the possible presence of other possible claims. But the complaint, even when read with the fullest liberality, does not assert any claims other than those described above. It of course is the complaint filed in this matter that controls the scope of these proceedings.

(rec. at 45-52 n.4).

The Fifth Circuit affirmed the decision.

CONCLUSION

Petitioner's application for writ of certiorari should be denied because Respondent's motion for summary judgment was properly granted and affirmed on appeal. Petitioner cannot establish a prima facie case of or bear his ultimate burden of proving discrimination. The district court properly limited the scope of discovery, and that issue is not before this Court because Dawson failed to challenge the ruling timely. Finally, Petitioner's due process claim is not properly before the Court, and Dawson was accorded due process. Therefore, Petitioner's request for writ of certiorari should be denied.

Respectfully submitted,

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